No. 7569

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LAKE UNION DRY DOCK & MACHINE WORKS,
a corporation, *Appellant,*

—VS.—

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM A JUDGMENT
OF THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

RAYMOND G. WRIGHT,
H. B. JONES,
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SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF TEXTS CITED

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STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, entered upon the 12th day of June, 1934, by the Honorable Jeremiah Neterer, Judge.

The suit was brought by appellee as an action at law to recover for damages sustained by the United States Coast Guard Cutter "Guard", as the result of a fire at Appellant's plant on December 30, 1931. The parties, by stipulation, waived a trial by jury (Tr. p. 10) and the cause was submitted to the Court for determination. At the conclusion of the hearing, appellant served and filed a written motion for a judgment of dismissal. (Tr. p. 75) On this being denied, appellant proposed findings of fact and conclusions of law (Tr. p. 76-83) as did appellee.

Subsequently the Court made and entered findings of fact and conclusions of law in the cause. (Tr. p. 13-18) Appellant immediately excepted to a number of these findings and conclusions, as well as to the failure of the Court to make and enter several of the findings of fact which it had proposed. (Tr. p. 83-90) Appellant further requested additional findings on propositions of law and fact, (Tr. p. 83-90) which findings the Court declined to make, (Tr. p. 90) and to this action appellant likewise excepted. (Tr. p. 90) All of these exceptions were allowed by the Court. (Tr. p. 90)

Judgment was thereupon entered in favor of the appellee and against the appellant in the sum of $3362.00, together with interest thereon at the legal rate from March 12, 1932, plus costs. (Tr. p. 19 and 20) Appellant immediately excepted to the judgment, which exception was noted and allowed. (Tr. p. 20) It is from that judgment that this appeal is prosecuted.

Appellant operates a dry dock and repair yard in Seattle, the plant being located on the south end of Lake Union. Shortly prior to the time of the fire, appellant entered into a written contract (Plaintiff's Exhibit 1) with appellee, to make certain repairs to the United States Coast Guard Cutter "Guard", for an agreed price of $650.00. This instrument contained the following provision in reference to fire protection:

> "General Conditions — Fire Protection. It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection during the time in dry dock or on the marine way."

As a portion of the work to be done required that the boat be taken out of the water, the vessel was drawn up on a barge, or, as it was called by the witnesses, a floating dry dock, thirty-two feet wide by seventy feet long. This floating dock was moored in an open waterway on the south side of a wharf which ran in a westerly direction out into the lake. This wharf formed the north side of the waterway referred to, which waterway was approximately one hundred feet wide, being bounded on the south by a row of piling running parallel to the wharf.

A large building with open sides, known as a joiner shop, had been erected on the wharf in such a position as to be parallel with the latter. The south side of this building was in about thirty feet from the south edge of the wharf and its east end extended approximately thirty feet beyond the east end of the floating dry dock. Fifteen feet east of this joiner shop, and on the same

wharf, was a boiler room twelve feet by sixteen feet in size. This latter building was in a northeasterly direction from the floating dock and was approximately fifty feet distant therefrom. Appellant's entire plant was adequately equipped with fire fighting devices.

On the morning of December 30, 1931, at about the hour of five o'clock, a fire was discovered in the boiler room. The fire department was immediately called, but, for some reason, it did not respond promptly. The wind, at the time, was from the northeast, blowing toward the "Guard," and the fire was communicated to the joiner shop, with the result that most of this building and the boiler room were entirely destroyed.

Prior to the fire, and for the purpose of furnishing protection to the vessel against fire, a one hundred and fifty foot length of hose, with an inside diameter of one inch, had been connected to a main on the wharf opposite the floating dock and the nozzle end had been taken on board the vessel. At the time of the fire, a crew of two was stationed on the "Guard", and these men were called immediately after the fire was discovered, at which time it was just beginning to break out of the boiler room. They immediately took the hose from their own vessel and turned the water on the burning building. After several minutes they realized that they could not extinguish the blaze, whereupon they went to the joiner shop to get a dinghy belonging to their boat. This they carried to a place of safety. On returning to the "Guard", some fifteen or twenty minutes after they had left the boat, they discovered that the

floating dock was beginning to take fire, whereupon they cut it loose from the wharf and, with the aid of the wind, moved it to the south across the waterway, where they extinguished the blaze. In the interim, the vessel had become badly scorched and it was subsequently necessary to repair her, the expense of which amounted to $3362.00.

Suit was thereafter brought by appellee aaginst appellant to recover this sum, it being charged that the latter company was a bailee of the vessel for hire and that after the fire had been discovered, it had negligently permitted the blaze to spread to the boat. No negligence was alleged in connection with the origin of the fire. Appellee further charged that appellant had violated its contract in that it had failed to furnish protection against fire as called for by that agreement.

These allegations were denied by the appellant and the latter further pleaded, as an affirmative defense, that the crew of the vessel had ample opportunity to remove the "Guard" to a position of safety and that they were guilty of a breach of a legal duty in failing to do so.

ASSIGNMENTS OF ERROR

Appellant's assignments of error (Tr. p. 22-28) can be classified into four general categories, and for the sake of convenience they will be thus considered in this brief. We contend that the Court erred:

I. IN HOLDING THAT THE RELATIONSHIP EXISTING BETWEEN APPELLEE AND APPELLANT AT THE TIME OF THE FIRE WAS THAT OF BAILOR AND BAILEE.

(a) In making and entering that portion of Finding of Fact No. 3 reciting:

"The Court finds that the relation between the plaintiff and the defendant was that of bailor and bailee, under bailment to the mutual benefit of both parties." (Assignment of Error VI; Tr. p. 24).

(b) In failing and refusing to make findings upon the following propositions as requested by appellant:

"That at the time of the occurrence of the fire, the vessel was in the possession and under the control of the plaintiff, and not in the exclusive possession and control of the defendant." (Assignment of Error VIII (f); Tr. p. 28).

II. IN HOLDING THAT THE APPELLANT DID NOT EXERCISE ORDINARY CARE IN PROTECTING THE "GUARD" AFTER THE FIRE WAS DISCOVERED.

(a) In making and entering that portion of Finding of Fact No. 3 reciting that:

"said bailee failed to exercise, under the circumstances, ordinary care required under the law and the said contract." (Assignment of Error VI; Tr. p. 24).

(b) In failing and refusing to make findings upon the following proposition as proposed and requested by appellant.

"That defendant's watchman endeavored to reach the fire hose upon the northerly side of the shed upon the wharf adjoining the vessel, but that by reason of the draft and the heat carried under the roof, he was unable to do so, and was likewise unable to make use of the chemical cart above re-

ferred to." (Assignment of Error VII (g); Tr. p. 26).

III. IN HOLDING THAT APPELLANT DID NOT FURNISH THE "GUARD" WITH THE FIRE PROTECTION CALLED FOR BY THE CONTRACT.

(a) In making and entering the portions of Finding of Fact No. 3 reciting:

(1) "That there was no fire hydrant or water main for fire protection on the wharf adjacent to the dry dock, or the 'Guard', or between said vessel and the joiner shop." (Assignment of Error II; Tr. p. 22, 23).

(2) "That the fire equipment carried by the 'Guard' for its own protection was rendered useless during the time it was in dry dock." (Assignment of Error III; Tr. p. 23).

(3) "That there was no fire protection afforded for the protection of the vessel on the dry dock, either by water supply or chemical apparatus." (Assignment of Error V; Tr. p. 23).

(b) In failing and refusing to make and enter the following portions of appellant's proposed findings:

(1) "That said vessel was required to carry, and did carry, pursuant to Coast Guard Regulations in evidence herein as defendant's Exhibit A-6, fire equipment for her own protection, consisting of extinguishers, sand in boxes, water in buckets * * *". (Assignment of Error VII (a); Tr. p. 24).

(2) "That the commanding officer of said vessel considered that the hose furnished by the defend-

ant, and the water supply, to be made available, was sufficient to take care of a fire on board said vessel." (Assignment of Error VII (c); Tr. p. 25).

(c) In failing and refusing to make a finding on the following proposition as requested by appellant:

(1) "That the purpose of the fire protection clause in the contract between the plaintiff and defendant, was to furnish to the vessel similar fire protection to that provided by her own equipment when not out of commission, and that such protection was furnished by the hose and water supply provided for said vessel." (Assignment of Error VIII (a); Tr. p. 27).

(2) "As to whether or not the commanding officer of the 'Guard' considered and accepted the hose furnished to the vessel as being adequate and sufficient for its protection." (Assignment of Error VIII(b); Tr. p. 27).

IV. IN FAILING TO HOLD THAT THE CREW OF THE "GUARD" BREACHED THEIR DUTY TO PROTECT THEIR VESSEL.

(a) In making and entering the portion of Finding of Fact No. 3 reciting:

"The seamen acted with all diligence, and as reasonably prudent persons would under the circumstances." (Assignment of Error IV; Tr. p. 23).

(b) In failing and refusing to make and enter

the following portions of appellant's proposed findings:

(1) "That the crew of two men left on board were considered by the plaintiff and its commanding officer to be adequate and sufficient to care for the safety of said vessel in any emergency that might ordinarily arise, and also were considered sufficient to move the dry dock, if necessary, and to extinguish any fire, or take care of anything out of the ordinary which would occur on board said vessel." (Assignment of Error VII (b); Tr. p. 25).

(2) "That at the time the members of the crew went from the vessel to the wharf, the fire was confined to the inside of the boiler room, and the flames were just beginning to break through the roof, and that the members of the crew endeavored for a period of five to seven minutes to put out the fire in the boiler room." (Assignment of Error VII (d); Tr. p. 25).

(3) "That the dock was pushed and drifted out in a southwesterly direction into the open channel, out of range of the fire, and the crew thereupon extinguished any flames remaining by the use of buckets and water dipped from alongside the dock." (Assignment of Error VII (e); Tr. p. 25).

(4) "That at no time did the crew use the hose furnished by the defendant upon said vessel; that had said hose been kept on board said vessel, and used for the protection of said vessel, it would have

prevented or substantially lessened the damage that said vessel suffered from the fire." (Assignment of Error VII (f); Tr. p. 25).

(5) "That the dry dock on which the vessel rested, was capable of being readily moved by two men, particularly in the case of an assisting breeze; that at the time of such fire there was a light breeze from the north or northeast, blowing from the fire towards the dry dock; that the crew of said vessel did not undertake to move said dock for at least fifteen minutes after they were awakened, and went on board the wharf and began fighting the fire; that had they undertaken to move it at once, or even at the time they ceased using the hose and went to carry out the dinghy, they could have moved it out of reach of the fire in time to have prevented the damage that occurred to the boat, or a very substantial part thereof; that there was nothing to prevent the crew from moving said vessel immediately they were awakened, and went on deck." (Assignment of Error VII (h); Tr. p. 26).

(c) In failing and refusing to make findings on the following propositions as requested by appellant:

(1) Whether or not, if the hose kept on board the vessel had been used on the vessel, it would have prevented or substantially lessened the damage which occurred. (Assignment of Error VIII (c); Tr. p. 27).

(2) What period of time elapsed from the time

that the crew of the "Guard" was awakened, and available for duty, to the time that they commenced moving the dry dock upon which the "Guard" rested away from the dock. (Assignment of Error VIII (d); Tr. p. 27).

(3) Whether or not the damage to the "Guard" could have been prevented, had the crew of the "Guard" cut it loose and pushed it away from the dock:

1. Immediately upon responding to the alarm and endeavoring to put out the fire;

2. At the time of ceasing efforts to put out the fire and before moving the dinghy.

(Assignment of Error VIII (e); Tr. p. 27, 28).

Appellant also, of course, assigns error in the making and entry by the Court of the conclusion of law to the effect that the appelee is entitled to recover judgment against the appellant in the sum of $3362.00 together with interest and costs, or in any sum whatsoever. (Assignment of Error IX; Tr. p. 28). Appellant likewise assigns error in the making and entry of judgment herein awarding judgment in favor of the appellee and against the appellant for the sum of $3,362.00, with interest and costs. (Assignment of Error X; Tr. p. 28).

ARGUMENT

In this brief, appellant will consider separately each of the four main categories into which its assignments of error have been segregated.

I. BAILMENT

Appellee's case in the District Court was predicated upon the theory that the relationship existing between the parties was that of bailor and bailee under a bailment for the mutual benefit of both. They offered no proof of negligence and argued that inasmuch as this was a case of bailment, they were "relieved of sustaining the burden of proof of showing lack of ordinary care, and plaintiff, by showing that its boat was returned to it damaged by the fire, has thrown the burden of proof on the defendant to show that it exercised ordinary care." The Court subsequently held "that the relation between the plaintiff and the defendant was that of bailor and bailee, under bailment to the mutual benefit of both parties". (Finding of Fact No. 3, Tr. p. 18).

In our opinion, this theory is not applicable, and no presumption of negligence on the defendant's part is raised, for the following reasons:

A. This is not a case of bailment in which such presumption arises because there was not a transfer of exclusive possession to the appellant.

B. Even if it was a bailment, the claimed presumption is not applicable because:

1. The showing that the damage occurred by fire overcomes any presumption of negligence and the burden of going forward with the proof of actual negligence remains with the plaintiff.

2. The complaint pleads certain specific and definite acts of negligence, and in such a case, the burden is on the plaintiff to establish the same without the aid of any presumption.

A. RELATIONSHIP NOT THAT OF BAILOR AND BAILEE

It is essential to the creation of a bailment that exclusive possession of the article involved be delivered over to the custody and control of the bailee.

The necessity of exclusive possession in the bailee is stated in 6 *C. J.* 1103, *Section* 23, as follows:

> "Such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, as will make him liable as its sole custodian to the latter in the event of his negligence or fault in discharging his trust without respect to the subject matter, and as to require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged."

A very complete annotation on the essentials of a bailment appears in 1 *A. L. R.* 394. The requirement of exclusive possession by the bailee is summarized in the following language, on page 395.

> "On the question of fact, whether or not there is a sufficient delivery in any given case, the general rule is that, in order to constitute such a delivery, there must be a full transfer, either actual or constructive, of the property to the bailee, so as to exclude the possession of the owner and all other persons, and give to the bailee, for the time being, the sole custody and control thereof."

In the case at bar there was no exclusive possession of the boat by the dry dock company at any time. While

the appellant had men working on it during the day, the crew of the vessel was also on board doing work. This is clearly shown by the log of the "Guard" (Plaintiff's Exhibit 4) which, for December 29th (the fire occurred early on the morning of the 30th), shows that seven men, constituting the crew, were on board performing routine activities and repair work. The log shows that the appellant's workmen left the vessel at 4:30 P. M. and it was further shown that two members of the crew were kept on board in charge of the vessel during the night. (Tr. p. 36, 38) The fact that the boat rested in appellant's dry dock, manned by, and in charge of, her own crew, does not place her in the exclusive possession of the appellant. The very fact that the regular crew stayed with the vessel both day and night negatives any claim of bailment. The control of the boat was at all times retained by the appellee.

This identical question was presented to the Circuit Court of Appeals for the 4th Circuit in *The Kennebec,* 1919, 258 *Fed.* 222. The Baltimore Dry Dock & Shipbuilding Co. libeled the steamship "Kennebec" for a repair bill. The vessel filed a cross-libel for damages sustained by it while on the libelant's dry dock, alleging that the dry dock company had failed to furnish steam to the boat, as a result of which certain water pipes froze and burst. Counsel for the "Kennebec" claimed that the relationship of the parties was that of bailor and bailee, but this contention was rejected by the Circuit Court of Appeals. The following statement of the law appears on page 224 of the reported decision:

> "Appellant says the law of bailment applies and cites cases illustrating its familiar principles. But an essential element of bailment is delivery to the bailee, and we think it plain that there was no such delivery in this case. The work undertaken by appellee was confined to the exterior of the hull, and had nothing to do with any other part of the vessel. The Captain continued in command and he and the crew stayed on board. In every substantial sense the ship remained in the control of her master, and the dock company certainly did nothing to interfere with that control or to prevent him from doing whatever he thought necessary to protect the machinery of the vessel. The doctrine of ordinary care of a bailee has no application."

This rule of law has always been followed in the State of Washington. In *Boe v. Hodgson Graham Co.*, 1918, 103 *Wash.* 669, 175 *Pac.* 310, appellant sought to recover for the loss of a boat, claiming that respondent was a bailee in sole possession and control of the vessel at the time it foundered. The Court held that the master of the boat was on board as appellant's representative, and therefore that no bailment existed and that no presumption of negligence on the part of the respondent could be indulged in, saying:

> "The possession of respondent, *not being exclusive,* the rule as to the burden of proof for which the appellant contends, does not apply. 6 C. J. 1158; *Bertig v. Norman,* 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913 D. 943; *North Atlantic*

Dredging Co. v. McAllister Steamboat Co., 202 Fed. 181." (Italics ours).

This same principle was referred to in *McDonald v. Perkins & Co.*, 1925, 133 *Wash.* 622, 234 *Pac.* 456, 40 *A. L. R.* 859. In holding that in the ordinary case of bailment the burden is upon the bailee to explain the loss of, or damage to, the subject of the bailment, the Supreme Court of the State of Washington, said.

> "The authorities are not agreed upon the question who has the burden of proof of explaining the disappearance of property from the possession of a bailee. The better rule, we think, is that adopted by the trial court. The rule has its foundation in necessity; a bailee, *having exclusive possession of property,* has also the exclusive means of knowing what becomes of it. In fact, he is the only one who can know, and having the exclusive means of knowledge, it is imposing upon him no undue hardship to require him to explain." (Italics ours).

In *Ex Parte Mobile Light & R. R. Co.*, 1924, 211 *Ala.* 525, 101 *So.* 177, 34 *A. L. R.* 921, the Court held, in sustaining a demurrer to the complaint, that a bailment is not created by leaving an automobile in an outdoor parking lot where a charge is made for the privilege, saying:

> "We find nothing in the complaint indicative that possession and control, actual or constructive, was surrendered to, or assumed by, the defendant. * * * An essential element of bailment is possession

in the bailee. His duties of reasonable care spring out of his possession."

An excellent statement of the law is found in *Broaddus v. Commercial National Bank*, 1925, 113 *Okla.* 10, 237 *Pac.* 583, 42 *A. L. R.* 1331. This case holds that the owner of an office building is not a bailee of the contents of a tenant's room outside of office hours. The Court reviews a great many authorities and concludes:

> "The rule is elemental that, in order to constitute a transaction in bailment, there must be a delivery to the bailee, either actual or constructive. It has been held that such a delivery of property must be made to the bailee as will entitle him to exclude for the period of the bailment the possession thereof, even of the owner. *Fletcher v. Ingram*, 46 *Wis.* 191, 50 *N. W.* 424. * * * The evidence, however, discloses that each of the defendants and their stenographer had a key to said offices and access thereto at all times. *Therefore one of the necessary elements of a contract for bailment is fatally absent, to-wit, such a delivery to the bailees as would entitle them to exclude for the period of the bailment the possession thereof, even of the owner.*" (Italics ours).

In *Kee v. Bethurum*, 1930, 146 *Okla*, 237, 293 *Pac.* 1084, the Supreme Court of Oklahoma held that a woman who rents out a room in her private home is not a bailee of property left in that room even during the renter's absence, saying:

> "The plaintiff was not excluded from possession

of the property and the defendant did not have the sole custody and control thereof. The most that can be said is that the property was under the joint control and in the joint custody of the plaintiff and the defendant. * * * There was no bailment of the property in question * * * ."

It is because of this feature of exclusive possession by the bailee in bailment cases that the Courts have frequently held that the redelivery of the property to the bailor in a damaged condition raises a presumption of negligence on the part of the bailee. The reason underlying this rule is that the bailee is the only one who can know the facts concerning the damage and that the bailor, being excluded from the property, is in no position to establish the cause of the loss. When the element of exclusive possession is absent, there is no bailment, and the presumption fails.

For other cases on this point, see:

Bertig v. Norman, 1911, 101 *Ark.* 75, 141 S. W. 201, *Ann. Cas.* 1913 *D* 943;

Atlantic Coast Line R. Co. v. Baker, 1903, 118 *Georgia* 809, 45 *S. E.* 673;

Blondell v. Consolidated Gas Co., 1899, 89 *Maryland* 1732, 43 *Atl.* 817, 46 *L. R. A.* 187.

Com. v. Doane, 1848, 1 *Cush.* (*Mass.*) 5.

Sherman v. Commercial Printing Co., 1888, 29 *Mo. App.* 31.

Wentworth v. Riggs, 1913, 159 *App. Div.* 899, 143 *N. Y.* 955.

Voland v. Reed, 1917, 164 *N. Y.* 19.

Matthews v. Carolina & M. W. R. Co., 1917, 175 N. C. 35, 94 S. E. 714, L. R. A. 1918C 899.

Outcault Advertising Co. v. Brooks, 1917, 82 Ore. 434, 158 Pac. 517, 161 Pac. 961.

Crouse v. Lubin, 1918, 260 Pac. 329, 103 Atl. 725.

Fletcher v. Ingram, 1879, 46 Wis. 191, 50 N.W. 424.

In the light of the foregoing authorities, we feel that it must be held that the relationship existing between the appellee and the appellant was not that of bailor and bailee, inasmuch as appellant did not have exclusive possession of the vessel. If, then, this was not a bailment, the liability of the appellant cannot be determined, as was the case in the trial court, by the application of rules pertaining to such a relationship, but it must be arrived at by a consideration of the rights and duties arising out of the express contract entered into between the parties.

B. IN NO EVENT IS PRESUMPTION OF NEGLIGENCE APPLICABLE

But even assuming that this is a case of bailment, the presumption so strongly urged upon the trial court by the appellee is still inapplicable. As previously pointed out, the theory of appellee's case was that appellant was liable on two grounds: first, that they were negligent in allowing the fire to spread to the "Guard" after it had been discovered, and second, that they had failed to furnish the vessel with fire protection as called for by the contract. In support of this first allegation, appellee contended that it was sufficient to show that

the boat was returned to it in a damaged condition and that the burden was then upon the appellant to prove that it had exercised reasonable care in protecting the same. It will be observed that no effort was made in appellee's case to prove negligence on the part of the dry dock company.

1. PRESUMPTION INAPPLICABLE WHEN DAMAGE IS CAUSED BY FIRE

It is well established, however, that the rule contended for by appellee is not applicable where it appears that the damage resulted from some cause not ordinarily or necessarily attributable to the bailee's negligence, such as fire or theft. In such cases, the burden of proof is upon the claimant to prove the negligence relied on.

This contract, of course, should be interpreted according to the law of the State of Washington, which, on this point, is stated very clearly in *Colburn v. Washington State Art Ass'n,* 1914, 80 *Wash.* 662, 141 *Pac.* 1153, *L. R. A.* 1915A, 594, as follows:

> "Counsel for respondent invoke the general rule that, in an action to recover damages against a bailee for goods placed in his possession, which goods are not accounted for in any manner and not returned to the bailor upon demand, the burden of proof, as against his presumed negligence, then rests upon the bailee. This rule was recognized by this Court in *Pregent v. Mills,* 51 *Wash.* 187, 98 *Pac.* 328, but it is not without its limitations in cases of loss by burglary, larceny, fire, and other causes which, from themselves, do not point to

negligence on the part of the bailee. In other words, when the bailee has shown loss from some such cause, he has met the prima facie case of negligence made against him by his failure to return the goods, and the burden of proof as to his negligence then rests upon the plaintiff as in any other case of alleged negligence."

A more recent statement of the law appears in *Burke v. Bremerton*, 1925, 137 *Wash.* 119, 241 *Pac.* 678, where it is said.

"The law, with reference to the liability of warehousemen, is well settled. A warehouseman is bound to exercise ordinary diligence only. *Colburn v. Washington State Art Ass'n*, 80 *Wash.* 662, 141 *Pac.* 1153, *L. R. A.* 1915*A*, 594. When, however, it is shown that the loss is occasioned by larceny, burglary, fire, or other cause, which of themselves do not point to negligence on the part of the bailee, the bailee has then met the prima facie case made against him by his failure to return the goods, and *the burden of proof as to negligence then rests upon the plaintiff, as in any other case of alleged negligence. Colburn v. Washington State Art Ass'n.* supra; *Firestone Tire & Rubber Co. v. Pacific Trans. Co.*, 120 *Wash.* 665, 208 *Pac.* 55, 26 *A. L. R.* 217; *Harland v. Pe Ell State Bank*, 122 *Wash.* 289, 210 *Pac.* 681; *McDonald v. Perkins & Co.*, 133 *Wash.* 622, 234 *Pac.* 456." (Italics ours).

The rule stated in the Washington cases referred to above is recognized by the Supreme Court of the

United States in *Southern Railway Co. v. Prescott,* 1916, 240 *U. S.* 632, 60 *L. Ed.* 836, 36 *Sup. Ct. Rep.* 469:

> "The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence."

In support of this rule, the Court cites a considerable number of cases, including *Claflin v. Mayer,* 1878, 75 *N. Y.* 260, 31 *Am. Rep.* 467, from which the Supreme Court of Washington quoted extensively in the case of *Colburn v. Washington State Art Association, supra,* 1914, 80 *Wash.* 662, 141 *Pac.* 1153, *L. R. A.* 1915A 594.

The same rule is recognized, and additional authorities given, in 6 *C. J.* 1160. In two exhaustive annotations, 9 *A. L. R.* 559, *and* 71 *A. L. R.* 767, the decisions are collected and the general rule is stated to be as follows:

> "Using the term, 'burden of proof' in the sense of ultimate burden of establishing facts necessary to recovery, and not in the sense merely of a duty

> to 'go forward' with the evidence, the authorities in general hold that the burden of proof to establish negligence on the part of the bailee, where the property is destroyed by fire, is on the bailor."

Therefore, even assuming that this was a case of bailment, when it was made to appear that the damage resulted from fire, any presumption of negligence, or prima facie showing resulting from the fact of damage, was overcome, and the duty of affirmatively establishing appellant's negligence still rested on the appellee.

2. PRESUMPTION INAPPLICABLE WHEN SPECIFIC ACTS OF NEGLIGENCE PLEADED

Moreover, the presumption relied upon by appellee has no application for another reason, namely, because the acts of negligence relied upon are specifically pleaded.

Reference to the complaint discloses that appellee does not claim that it delivered the vessel into the exclusive possession of the appellant, but simply states that the appellant was employed to do some repair work on it, that while undergoing such repairs a fire occurred, (which fire is not claimed to have been caused by negligence), and that such fire spread to the vessel because of the negligence of the appellant. (Complaint, paragraph IV, Tr. p. 3) The complaint further sets forth in paragraph V (Tr. p. 4) other specific acts of default or breach of contract with respect to the furnishing of fire protection. Having alleged specifically the acts of negligence relied upon, to-wit: permitting the fire to spread, and failing to provide proper fire protection, such specific acts constitute the basis of the suit

which the appellee must establish. The pleading of such definite and specific acts of negligence is inconsistent with any theory of presumption.

This is clearly pointed out in *Delaware Dredging Co. v. Graham,* 1930, 43 *Fed. 2nd* 852, as follows:

> "In a cause of loss or damage, the libelant has a prima facie case if he shows that such loss or damage occurred while the subject of the bailment was in the sole and exclusive custody of the bailee. This showing, however, merely imposes upon the bailee the duty of going forward with the evidence. It does not, properly speaking, constitute evidence of negligence. When the bailee accepts this duty and shows how the loss occurred, the force and effect of the prima facie case disappears. Then, unless it affirmatively appears from the evidence so produced that the loss was caused by the negligence of the bailee, the burden reverts to the libelant (or, perhaps more properly, the burden originally upon him, is revived), and it becomes incumbent upon him to produce evidence of negligence on the part of the bailee; otherwise, his case fails. The result will be the same if, as in the instant case, the libelant does not choose to rest his case upon proof of delivery and failure to return, but elects to adduce evidence showing the circumstances under which the loss occurred. * * * In *Hildebrandt v. Flower Lighterage Co.* (*D. C. N. Y.*) 277 *Fed.* 436, 437, Judge Mack (orally) said: 'As I say, if there were no proof at all, except the handing over or the fail-

ure to return, they (bailees) would be liable; when there is proof of just what was done, even though cause of the particular damage is not shown, the burden of showing negligence remains on the libelant.' "

A good discussion of this principle is contained in *Metropolitan Electric Service v. Walker* 1924, 102 *Okla.* 102, 226 *Pac.* 1042, where the Court says:

"It would seem that where the loss occurred from fire, theft, burglary, or causes ordinarily held to be beyond the control of the bailee, and the plaintiff alleges that the loss occurred from these causes 'and by reason of the negligence of the bailee', the plaintiff must ordinarily follow up his proof of bailment, demand, and failure to return by proof also of the negligence of the bailee."

In a similar case, the Supreme Court of Washington made the following statement. (*Glacier Fish Co. v. North Pacific S. P. Co.*, 1924, 131 *Wash.* 426, 230 *Pac.* 410).

"It is unnecessary, as we view the facts of the case, to pursue this discussion for the reason that this case, to our minds, does not present one where a bailor is relying upon a prima facie case of negligence established merely by evidence of his delivery to the bailee of a bailment in good condition and a redelivery in a damaged condition, for, as we have already noted, the respondent produced positive testimony of a specific act of negligence and is not relegated to a prima facie showing."

We insist, therefore, that the relationship existing between the parties was not that of bailee and bailor, as found by the trial court. Moreover, we contend that even if there was a bailment in this case, the presumption contended for by appellee did not apply, and that the burden was still upon it to prove by a preponderance of the evidence that appellant was guilty of negligence in the respects charged. This burden they made no attempt to meet, being content to rely merely upon a prima facie showing of the return of the vessel in a damaged condition.

II. APPELLANT WAS NOT GUILTY OF NEGLIGENCE

In Paragraph IVof its complaint, (Tr. p. 3) appellee alleged:

> "That on said date a fire originated upon the premises of the defendant corporation, and because of the negligence of the defendant corporation, its officers and employees, said fire spread to the United States Coast Guard Cutter "Guard" while in the defendant's dry dock."

There was no charge that appellant was guilty of any negligence in connection with the origin of the fire.

> "Q. What is your practice with relation to maintaining a fire in this boiler room, and the conditions under which fire is maintained, or precautions that were taken about it? What is the occasion for any fire at all?
>
> "THE COURT: Is that material?

"MR. JONES: I do not know. I am not quite sure what counsel's contention is. If it is presumed that the fire arose from negligence, if that is his contention.

"THE COURT: I do not think the Court is interested. *The question is whether sufficient precaution was taken after the fire broke out.*

"MR. JONES: If your Honor does not regard that as material, I will withdraw it.

"THE COURT: *Is that the idea, Mr. DeWolfe?*

"MR. DeWOLFE. *I think that is right.*"

(Tr. p. 55 and 56, Italics ours).

The only question then is whether there was negligence on the part of the appellant in what was done or not done after the fire was discovered. Leaving aside, for the moment, any contractual liability in this regard, we submit that there is absolutely no showing of negligence in respect to any such act of commission or omission. It is not suggested that the appellant did anything which caused the fire to spread, and no evidence has been offered as to anything which the appellant might or could reasonably have done to have prevented it from reaching the "Guard". In the lower Court it was suggested that if the watchman had been in the boiler room when the fire started he could have put it out, but this, of course, is beside the point, and outside the issues of the case. It is not claimed that the watchman should have been in the boiler room, or that it was negligent for him not to have been there. The

allegation of negligence on which appellee relies is that the dry dock company was at fault in allowing the fire to spread to the "Guard" after its discovery. However, there is no evidence whatsoever that there was anything which the watchman could then have done to have prevented the spread of the blaze.

The fire was first noticed by the witness Gallagher (Tr. p. 67) who was not an employee of the appellant. (Tr. p. 67) At this time the flames filled the interior of the boiler room, but they had not yet broken through the walls. (Tr. p. 67) Gallagher ran to the watchman's office, which was about 125 feet from the boiler room (Tr. p. 61) and from which the fire was not visible, (Finding of Fact No. 3, Tr. p. 16) and notified Clark, the man on duty, and the only employee of the appellant in the plant. (Tr. p. 67) At the same time he telephoned Central, advising her of the blaze, and asking her to notify the fire department. (Tr. p. 61, 67) Clark immediately ran out and over to the north gate of the plant. (Tr. p. 61) This gate was the proper one for the fire department to use, in view of the location of the blaze in the yard, but it was closed and locked. (Tr. p. 61) Clark unlocked this gate and opened it so that the apparatus could get in without difficulty. (Tr. p. 62)

The watchman had been at the plant when other alarms had been turned in, and knew from experience that the first pieces of equipment could be expected to arrive on the scene in from three to five minutes. (Tr. p. 61, 62) For some reason, however, the fire depart-

ment did not immediately respond on this particular occasion, and did not arrive for a period estimated by various witnesses at from ten to twenty-five minutes. (Finding of Fact No. 3, Tr. p. 17, 45, 68, 69) This delay was so noticeable that Gallagher telephoned a second time. (Tr. p. 68) The trial court found that although the fire department's equipment would ordinarily reach the plant in from three to five minutes, on this occasion it did not get to the scene until fifteen to twenty minutes after the first call. (Finding of Fact No. 3, Tr. p. 17)

As soon as he had finished unlocking the gate so as to admit the fire department, the watchman went at once to the scene of the fire. (Tr. p. 62) By this time the blaze had broken out of the boiler room, and was spreading toward the joiner shop, which was an open structure without sides. (Tr. p. 62). Clark considered the advisability of using the 50-gallon chemical wagon kept in the yard, but concluded that it would be useless in view of the headway gained by the fire. (Tr. p. 63) He then attempted to reach a two-inch fire hose attached to a hydrant near the northwest corner of the joiner shop, but was unable to use it because of the flames and heat carried by the draft down under the ridge of the roof of this building. Tr. p. 62) At this time the two men from the "Guard" were playing a stream from the smaller hose on the fire, so that this was not available to him. (Tr. p. 62) Clark then noticed that the fire department was not responding

promptly, and was on his way to put in another alarm when the first piece of equipment arrived. (Tr. p. 63)

There is no contradiction of the watchman's testimony, and there is no proof that he could have done anything more than he did. Certainly no one could argue that it was negligence for him to first open the gate for the fire department, or that he should have left the fire department to get into the yard as best they could while he fought single-handed a blaze which, when first discovered, filled the interior of a twelve by sixteen-foot building.

After opening the gate, Clark concluded that it would be useless to undertake to use the chemical extinguishers because of the headway gained by the fire. He noticed that one hose was being played on the fire, and he made an effort to reach the large fire hose, but was prevented from doing so by the heat and flames. Being concerned over the fire department's failure to arrive he then went to put in another call for assistance.

All this, we submit, was proper and just what any other reasonable man would have done under the same circumstances. Appellee has never suggested, and we cannot imagine, that there was anything more that the watchman could have done. Neither can we see any signs of negligence in the things which he did, nor has the appellee ever made any specific accusations in reference thereto.

In this connection, it should be borne in mind that appellant's watchman expected, as he had a right to expect, that the fire department would arrive in from

three to five minutes after the first call. In considering whether he acted as a reasonable and prudent man would have acted under the same or similar circumstances, this Court should remember that his actions were based on this assumption. Had he known that the department would not arrive for from 15 to 20 minutes, he might have acted in a different manner. Because he did not anticipate this unusual situation, however, he should not be held to be guilty of negligence.

We submit, therefore, that there is absolutely no evidence of negligence on the part of the watchman, the only employee of the appellant who was in the plant at the time. Appellee charges no negligence prior to the discovery of the fire, which, when first noticed, filled the interior of the twelve by sixten foot boiler room, and it does not appear that after its discovery the watchman could have done anything reasonably calculated to have overcome it. It was then obviously a blaze requiring the attention of the fire department.

III. APPELLANT FURNISHED AMPLE FIRE PROTECTION TO VESSEL

As previously pointed out, appellee, in addition to charging that appellant negligently permitted the fire to spread to its boat, alleged that the dry dock company "failed to provide ample fire protection for said vessel". (Complaint Paragraph V, Tr. p. 4) The contract covering the repairs to the "Guard" (Plaintiff's Exhibit 1) contained the following paragraph relative to the matter of fire protection:

"GENERAL CONDITIONS — FIRE PROTECTION: It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection *during the time in dry dock or on the marine way.*" (Italics ours)

Clearly this provision is not one of indemnity, making the appellant liable as insurer against any and every loss that may occur, for, if such were the intent, the contract would undoubtedly have provided that the contractor should assume responsibility for all damage, however occurring.

It is also very significant that this provision only applies "*during the time in dry dock or on the marine way.*" (Italics ours) Appellant was not required to furnish fire protection to the vessel when the latter was in the water.

As will be observed on reading the contract, (Plaintiff's Exhibit 1) appellant was called upon to do work both inside and outside the hull, requiring a total working time of fifteen days. Item 1 of the agreement, which covered the dry docking and work to be done at that time, indicates that this work was estimated to require only three days, so that obviously it was contemplated that the vessel would be out of the water for only a small portion of the entire time spent in the plant. While in the water, the "Guard" had its own pumping equipment, but this, however, was useless when the boat was in dry dock. J. H. Snydow, the officer in charge of the vessel, testified:

"Ordinarily we have fire hose for fire protec-

> tion on the boat, and have our own pumping equipment. We use 1½-inch hose. I do not know what pressure. * * * We could not operate our water system when on dry dock." (Tr. p. 39)

The fact, therefore, that appellant was required to furnish fire protection to the vessel only when it was out of the water indicates quite clearly, we think, that the purpose of the provision was to provide for the vessel the same character and extent of fire protection while out of the water that she would have on her own account while in the water—in other words to give her the equivalent of the protection afforded by her engines and pumps which she lost by reason of being on the floating dock.

A copy of the Regulations of the United States Coast Guard was put in evidence pursuant to stipulation of the parties (Tr. p. 11) and pertinent parts of the same are set forth in the Transcript of Record, pages 11 to 13. These Regulations require that vessels of the type involved be equipped with fire buckets (Sec. 1503, sub L), fire hose (Sec. 1563), and boxes of sand, scoops and portable fire extinguishers (Sec. 2054, sub. J). Apparently it was these requirements that appellee felt constituted ample fire protection for the vessel, and it would seem that they should constitute the standard which appellant would have to maintain under the contract. Of course the water buckets, sand boxes, scoops and chemical extinguishers provided by the boat, and which the inspection report (Plaintiff's Exhibit 6) establishes were there, were not affected by placing the

vessel on the floating dock. The only feature whose function was interfered with was the vessel's pump and fire hose, and it was to require appellant to furnish the equivalent of this protection that the provision referred to was obviously incorporated in the contract.

As far as the matter of fire protection furnished to the boat is concerned, therefore, the sole question is whether or not sufficient measures were taken by appellant to compensate the vessel for the loss of use of her own pump and fire hose. On this point the evidence is undisputed that a hose from 100 to 150 feet long (Tr. p. 34) with an inside diameter of one inch (Tr. p. 55) was furnished by the appellant for this very purpose, (Tr. p. 39, 43) that it was connected to a water main on the south side of the wharf just forward of amidships of the "Guard," (Tr. p. 34, 39) furnishing a pressure of 125 pounds per square inch, (Tr. p. 39, 54) and that the nozzle end was taken aboard the vessel. (Tr. p. 34, 35) This hose was capable of throwing a stream stated at all the way from 60 to 125 feet. (Tr. p. 55, 70)

This equipment was furnished by appellant for the express purpose of affording the "Guard" fire protection (Tr. 34, 39, 43) and was so accepted by J. H. Snydow, the officer in charge of the vessel, who testified on this point as follows:

> "We used it for our own protection on board the boat. We leave the end of the hose on board the "Guard" every night for our own protection." (Tr. p. 34)

It was hooked up, and Mr. Snydow tested it when he left, late in the afternoon before the fire.

> "The hose was connected when I left the evening before, the nozzle was just aport the pilot house." (Tr. p. 35) "I tried it every day and it was working all right, and there was water on the line. I used the water practically every day. There was a strong pressure." (Tr. p. 39)

Mr. Snydow, the officer in charge, considered that this hose was ample protection for his vessel. He testified.

> *"I considered that the hose would carry water enough to take care of a fire on board the "Guard."* (Tr. p. 40, Italic ours).

It seems to us that considering the purpose of this requirement in the contract, and the fact that the hose furnished by the appellant, and carried on board the "Guard" for its protection, was accepted as sufficient, without complaint or objection, and, as testified by the officer in charge, was considered by him as sufficient protection against any fire that might occur, that the defendant has fulfilled its obligation under this provision.

By the plaintiff's own showing, the facilities furnished were equivalent to those carried and considered by the vessel as sufficient for its own protection. It is not suggested that any other or additional equipment should have been furnished by the defendant to the vessel itself.

One of the most remarkable things about this feature of the case is that although appellee contends that the dry dock company did not furnish adequate fire protection to the vessel, it clearly appears that the crew of the boat made absolutely no attempt to use the facilities that were made available for this purpose. At no time did they make any use of the one-inch hose to protect their own vessel, even though a mere wetting-down of the boat would undoubtedly have kept it from scorching, thus preventing practically the entire damage. Even if apellant had placed a dozen fire extinguishers, and several additional hose lines aboard the "Guard," there is nothing to indicate that the two men on board the vessel at the time of the fire would have made any more use of them than they made of the one hose that was furnished. When the equipment that was made available for this very purpose was not used, what is there to indicate that if additional safeguards had been furnished, the crew would have resorted to them? The conclusion is irresistible that the same damage would have been sustained by the "Guard," no matter how many protective devices were furnished by appellant.

So far we have concerned ourselves principally with the fire protection afforded the vessel itself, as distinguished from that designed to safeguard the plant, though strictly speaking, it is probably the latter that we should be most concerned with in this case, inasmuch as the fire originated on the appellant's own property. If the fire had started on the "Guard" then

the question would be more particularly whether the equipment and facilities available for the protection of the vessel were sufficient, and this would involve the question discussed last herein. But where, as in this case, the fire started on the property of the dry dock company, the question of the sufficiency of the fire protection furnished relates rather to the safeguards afforded by the appellant for the care of its own property. If that protection was sufficient, according to reasonable standards, to protect the appellant's property from a fire originating thereon, then it was likewise sufficient to protect the property of others, including the "Guard," which could only be reached by communication of the fire through the property of the dry dock company.

On this point the trial court found that appellant's plant was adequately equipped with devices for protection against fire. See Finding of Fact No. 3, Tr. p. 15, 16, 17 and 18, which includes the following:

> "*That the plant of the defendant was equipped with modern and sufficient fire-fighting equipment for its own purpose,* consisting primarily of a number of chemical fire extinguishers located at various positions throughout the plant, and three 2½-gallon chemical extinguishers, separated by 20-foot intervals, were hung upon the south side of the posts supporting the south side of the joiner shop, and directly opposite said dry dock, and about thirty feet therefrom, and a 50-gallon chemical cart extinguisher was located upon the northerly side

> of said joiner shop; that said extinguishers were accessible and available for use, but the crew of the plaintiff had not been advised thereof by the defendant, nor by any other person advised or instructed in the use of such extinguishers, or given authority or permission to use the same; that a canvas covered fire hose and connection were located upon the northerly side of the joiner shed. * * * *The plant of the defendant was supplied with all necessary fire apparatus for its protection* * * *.*" (Italics ours)

In considering standards or requirements of fire protection, we think it is proper to take into account the protection afforded by the City's fire department, and the time within which the latter might be expected to respond to an alarm, which is shown to have been three or four, or not over five minutes. (Finding of Fact No. 3, Tr. p. 17, 56, 60, 61, 62). Obviously the precautions necessary to be taken in maintaining fire-fighting equipment or protection facilities on the premises would be much less where the City fire department was in a position to respond almost immediately, than if it were not available for an hour or so.

But in addition to the immediate availability of the City Fire Department, and besides the hose furnished for the protection of the "Guard," the appellant also maintained a two-inch fire hose connected to a hydrant on the wharf on the other side of the joiner shop, (Tr. p. 62, 70) which was capable of throwing a stream from 100 to 125 feet. (Tr. p. 70) It also maintained a

generous supply of chemical fire extinguishers located at various points throughout the yard, there being three 2½-gallon extinguishers located on the outer side of the supporting timbers of the open joiner shop immediately to the north of the "Guard," and about 20 or 30 feet away from the vessel. (Tr. p. 54) A large 50-gallon chemical extinguisher was located on the opposite side of this building, at the point marked "Y" on the plat introduced into evidence as Plaintiff's Exhibit 3B. (Tr. p. 54, 69) It was suggested that this latter was locked up at the time of the fire, but no proof was offered to this effect, and the positive evidence was to the contrary. (Tr. p. 57, 58, 63, 71) There was also a large 40-gallon extinguisher in another part of the plant. (Tr. p. 54, 69)

Mr. McLean, the president of the defendant company, testified that it had received frequent inspections and reports by the fire marshal's office and fire insurance companies, with whose recommendations the appellant had always complied. (Tr. p. 58, 59) The fire fighting apparatus maintained in appellant's yard was similar to that used in other plants of the same character. (Tr. p. 70).

As the trial court found, the plant of the appellant "*was equipped with modern and sufficient fire-fighting equipment for its own protection*"; it "*was supplied with all necessary fire apparatus for its protection.*" (Finding of Fact No. 3, Tr. p. 15, 17, 18. Italics ours)

There is no showing whatsoever that the damage to the "Guard" could have been prevented or lessened

had the dry dock company had any additional or different devices for fire protection. Nor does appellee suggest any other safeguards that might have been made available and which would have saved its vessel from damage.

Appellee does not contend that the dry dock company should have kept on hand, day and night, a fire-fighting crew to protect against the possibility of a fire. Such a requirement would be unreasonable, particularly when considered with reference to a small job such as this, involving a total of only $650.00.

Nor is it contended that appellant's practice of having one plant watchman was less than the care it should have furnished; in fact it is quite customary for a plant of this size and character to employ but one watchman, and if appellant's practice in this respect was sufficient, as seems to be conceded, the only remaining question was whether the man on duty at the time of the fire was negligent in his conduct after the blaze was discovered. This point has already been fully covered herein, and we submit that the man acted in a very reasonable and prudent manner under the circumstances.

We contend, therefore, that the fire protection furnished by the dry dock company was ample, not only as far as its own plant was concerned, but also in reference to the protection afforded to appellee's vessel. Certainly appellee has not sustained the burden of proof in showing that appellant did not furnish sufficient fire protection, and that this act of omission was the approximate cause of the damage sustained by the "Guard."

IV. FAILURE OF CREW TO PROTECT VESSEL

Appellant, in its answer, and at the trial, raised as an affirmative defense the contention that the crew of the "Guard" made no effort to save or protect their vessel, and that, had they made any reasonable efforts so to do, as required by their duty, by the Coast Guard regulations, and by common prudence, their boat would have been saved from any injury. We seriously contend that such damage as was sustained by the "Guard" was directly attributable to, and resulted from, the failure of the crew of the vessel to take proper precautions for the safety of their boat, and that consequently appellant is not responsible therefor.

The crew of the "Guard" was at all times under a definite legal duty to prevent or minimize the damage to the vessel, and this duty was entirely disregarded. The rule of law applicable to this situation is stated in Ruling Case Law as follows:

> "It is a fundamental rule that one who is injured in his person or property by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize the resulting damage, and that to the extent that his damages are the result of his active and unreasonable enhancement thereof, or are due to his failure to exercise such care and diligence, he cannot recover; or, as the rule is sometimes stated, he is bound to protect himself if he can do so with reasonable exertion or at trifling expense,

and he can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided." 8 R. C. L. 442, Sec. 14.

"Under the rule requiring the injured party to use reasonable efforts to lessen the resulting damage in cases of wrongful injury to property, it is the duty of one whose property is threatened with injury to take reasonable precautions and to make reasonable expenditures to guard against such injury; and if he fails to do so, and such precautions and expenditures would have protected the property, then he cannot recover the value of property destroyed." 8 R. C. L. 446, Sec. 16.

This same duty was likewise placed upon the crew by the official Regulations of the United States Coast Guard. (Tr. p. 11-13) These regulations contain, among others, the following provisions:

"They shall see that the regulations concerning lights in the storerooms to which they have access are strictly observed, *and that every precaution is taken to prevent fire or other accident.*" (Regulations, Sec. 1389, sub-Sec. 4, Tr. p. 12. Italics ours)

"*Every proper precaution shall be taken to guard against fire, and each crew shall be proficient at fire drill.*" (Regulations, Sec. 1503, sub-Sec. K. Tr. p. 12. Italics ours)

Appellant contends that the members of the crew of the "Guard" breached this legal duty in at least two respects, viz.:

1. In failing to use the one-inch hose to protect their own vessel.

2. In failing to cut the floating dry dock on which their vessel rested, loose from the wharf so that it would drift across the waterway, and out of the path of the flames.

1. CREW FAILED TO USE HOSE

We have already commented herein on the fact that appellant furnished to the "Guard" a section of hose from 100 to 150 feet long, with an inside diameter of one inch, and connected to a water main having a pressure of 125 pounds per square inch. This was made available to the "Guard" for the express purpose of protecting the boat from fire, and its commanding officer accepted it and considered it sufficient for that purpose.

When a fire finally occurred, however, the crew then on duty made absolutely no effort to use either this equipment or any of their boat's own fire-fighting devices to protect the vessel. (Tr. p. 41, 48) Instead, on being awakened, they immediately took the hose from the "Guard" and went with it onto the wharf, where they attempted to extinguish the blaze. (Tr. p. 41, 43, 44, 48) At that time the fire was breaking out of both the top and sides of the boiler room, and flames were jumping from fifteen to twenty feet into the air. (Tr. p. 42) The water proved ineffective (Tr. p. 41, 43, 44) and after the men had expended five to seven minutes (Tr. p. 44) in this manner, they realized that the fire was spreading to the joiner shop. They then

dropped the hose (Tr. p. 43, 44, 48) and went into this building for the purpose of getting, and carrying to a place of safety, a small dinghy, or lifeboat, belonging to their vessel. (Tr. p. 41, 42, 43, 44, 48) Nothing further was ever done by them with the hose.

Appellant does not want to appear ungrateful in criticizing the efforts of the crew to extinguish the fire on its wharf, but it does seem that the men showed a great lack of diligence and care in protecting their own boat. It was their absolute duty to immediately take some one of the simple precautions that would have saved the "Guard" from damage. It should have been obvious to the members of the crew, when they got on the wharf and saw that the blaze filled the interior of the twelve by sixteen-foot boiler room and that flames were breaking through the building and jumping from fifteen to twenty feet into the air, that they could not affect the fire with their hose. It was simply a waste of time for them to stand there for from five to seven minutes, and pour water on the blaze. Even when they realized the futility of their acts, however, it still did not occur to them to take any immediate steps to protect their own vessel. As Louis LaPlace testified:

> "Q. Did it occur to you to turn the hose on the "Guard" so as to keep it from catching fire?
>
> "A. No, sir." (Tr. p. 47)

It should be remembered that the principal damage suffered by the vessel was that it was scorched and charred by the heat. (Tr. p. 48, 49) The only parts of the vessel that burst into blaze were the mast, the

side of the wheel-house, and a canvas tarpaulin over the engine room. (Tr. p. 44, 48) Certainly the greatest part, if not all, of this damage could have been easily prevented had the crew used their hose in wetting down their own vessel.

2. CREW FAILED TO CUT FLOATING DOCK ADRIFT

Appellant's chief complaint, however, is that the crew delayed for a period of from fifteen to twenty minutes before cutting the floating dry dock loose from the wharf so that it could drift across the waterway and out of the path of the flames. There was one hundred feet of open water (Tr. p. 53) between the edge of the wharf and the row of piles on the south, and had such action been taken promptly, or even within the first ten or twelve minutes after the crew had been aroused, the damage could have been entirely avoided. As previously explained, the men spent the first five or seven minutes in attempting to extinguish the fire, before they realized that it was beyond control and was spreading to the joiner shop. Since this building was directly opposite the "Guard" the danger to it, and to the dinghy stored inside, was equally a danger to the larger vessel. The members of the crew testified that the first they did not believe the "Guard" to be in danger, but that at this point they changed their minds, concluding, however, that they still had time enough to save both the dinghy and the "Guard" (Tr. p. 44) The men thereupon dropped the hose (Tr. 44) and went into the joiner shop, picked up their dinghy, and carried the same about 100 or 125 feet farther

down the wharf to a point alongside the machine shop. (Tr. p. 49) This, they estimated, only required about three minutes, (Tr. p. 44) but it probably took considerably longer.

The men then returned to the "Guard" for the purpose of moving the floating dock on which it rested, across the waterway. (Tr. p. 42, 43, 44) By this time fifteen or twenty minutes had elapsed since the crew had first gone on the wharf, and the stanchions of the dry dock had just taken fire. (Tr. p. 41, 43) About two minutes later the first flames broke out on the "Guard." (Tr. p. 43) The witness Louis La Place testified:

> "I do not know just how long before the flames got to our boat, but I would say around 15 or 20 minutes at the most." (Tr. p. 43)

Each man cut loose one end of the floating dock, and as La Place testified, "it just drifted across the small passageway" (Tr. p. 42) to a point where it was out of the path of the flames. They were then able to put out the fire on their boat by taking buckets and dipping water out of the lake. (Tr. p. 42, 44, 49)

There is absolutely no reason why this action could not have been taken immediately, and had it been, the vessel would have been saved from all damage. The members of the crew frankly admitted that there was no reason why they could not have done this in the beginning, and confessed that such action would have saved their boat. La Place testified:

"Q. If you had cut your boat loose immediately, you would have avoided your damages?

A. I did not figure when I first stood there that it would burn the boat up. It was not any of my particular business to move the dry dock anyway.

Q. If you had cut the boat loose immediately you would have been far enough away not to be burned?

A. We could only get over here (indicating).

Q. You would not have been burned here (indicating)?

A. The stern might have got on fire.

Q. Well, at any rate, if you had cut her loose immediately, she would have had plenty of time to have drifted across here (indicating) before the fire got too hot?

A. *We probably could have if we had pushed it right away.* (Tr. p. 46. Italics ours)

Henry Schafer testified:

"If we had started at once to cut the 'Guard' from the dock perhaps we could have got it away without damage, but we did not think of it. Mr. La Place said we had better get the dinghy out." (Tr. p. 49)

The commanding officer, Mr. Snydow, testified that the two men on board were sufficient to handle the vessel as she rested in dry dock, and move the latter if necessary. (Tr. p. 38, 39) On this subject he said:

> "In my judgment two men were sufficient to handle the vessel as she rested in dry dock, and to move the dry dock if necessary. I did not think we had the right to move the dry dock. I considered two men sufficient to extinguish any fire or take care of anything out of the ordinary that would occur on board the 'Guard.' I think two men were sufficient to cut the dock loose, and guide the dock under the circumstances that existed. *I do not know of any reason why the two men on board could not have cast off the line and immediately moved the dock away from the scene of the fire.*" (Tr. p. 38, 39. Italics ours)

Mr. Cutting, manager of the dry dock company, testified that one man could move a loaded floating dock. (Tr. p. 55) Mr. Bale, the company's dock master, likewise testified that such a floating dock could be moved by one man, and stated that they never used more than two. Tr. p. 70, 71) He also said that there were poles easily available at the time of the fire with which to move the floating dock, and that it would have only taken five or six minutes to have pushed the latter across the waterway. (Tr. p. 70, 71)

In this particular instance it would not even have been necessary for the crew to have pushed the dock, as the wind would have carried it across the waterway without assistance, once it was cut loose. The evidence is conclusive and the trial court found (Finding of Fact No. 3, Tr. p. 17) that at the time of the fire the wind was from the northeast, that is, from the fire directly

toward the "Guard." Not only did the wind help move the floating dock after it had been cut loose from the wharf, but prior to that time, it blew the heat and flames toward the "Guard," which resulted in the scorching and charring of the vessel. This very fact should have indicated to the members of the crew, when they first came on deck, that their vessel was in danger, and they should have immediately cast off the lines and drifted away.

It is true that these men testified, as a part of appellees, case, that the wind was blowing in just the opposite direction, that is, from the southwest, and consequently that they did not think that they were in any danger. In fact, the trial Court commented on this evidence at the close of appelle's case, in denying appellant's motion for a dismissal. The Court at that time stated that in view of the direction of the wind, the men acted in a very prudent and reasonable manner.

However, evidence subsequently introduced showed conclusively that this was not the fact, but rather that the wind was blowing from the fire towards the vessel. Mr. Cutting testified that a building on the north side of the boiler room, and only 15 feet away from it, was not touched, (Tr. p. 55) indicating that the fire was being blown in the opposite direction. He also testified that when he arrived at the plant at 5:30, a half hour after the fire broke out, the wind was from the north. (Tr. p. 55) Mr. Gallagher, who discovered the fire, stated that the wind was blowing from the boiler room toward the "Guard," (Tr. p. 68) and Clark, the watch-

man, testified to the same effect. (Tr. p. 63) There was no positive evidence to the contrary.

That the evidence of the appellant's witnesses and the finding of the Court on this point is correct is confirmed by a reference to the log of the "Guard" (Plaintiff's Exhibit 4). Under date of December 30th the following notation appears:

> "The lines holding the dry dock were cut, and *with the assistance of the wind,* the dry dock was got clear of the wharf." (Italics our)

This evidence, appearing in appellee's own records made at the time, should conclusively establish that the wind was from the fire towards the boat.

This fact is very significant. In the first place, it entirely changes the burden of the duties which rested on the members of the crew. It is one thing to feel safe against a fire when the wind is blowing it in the opposite direction, but it is quite a different and more serious matter when the wind is blowing the fire toward one. That such was the case here is evidenced from the testimony and the physical circumstances. In the face of such a fact, how can it be said that the men charged with the duty of protecting the boat, and who admitted that they could have protected it by simply cutting it loose and shoving off from the wharf, acted in a reasonably prudent manner when they neglected this obvious duty for from fifteen to twenty minutes, and when they took time to save their small boat from apparent danger, although, as they frankly admitted,

(Tr. p. 44) the same danger equally threatened the larger vessel.

That they would have been out of danger, and thus saved their boat, had they done this sooner, is evidenced by the fact that as soon as the floating dock drifted across the waterway, they were able to take buckets and put out the fire which was on the side which was still toward the blazing wharf. Obviously, if they could do this, the boat itself would not have caught fire at that distance.

It may be conceded that the members of the crew of the "Guard" acted sincerely and as they thought best, but a good intention is not a legal excuse. Admittedly they spent from fifteen to twenty minutes before cutting their vessel loose, and admittedly they could in this time have moved it out of danger and avoided the damage, had they seen fit to do so. The principle that governs is not whether they acted in good faith in something else that they did, but whether, by the exercise of ordinary diligence, they could have moved the vessel to a point of safety and avoided the damage. That they could have done so is a point upon which the evidence is conclusive.

We contend, therefore, that the fact that the crew of the "Guard" failed to take even the simplest precautions for the protection of their boat when the latter could easily have been completely protected, constitutes a breach of the duty and obligation placed upon them by law and the regulations under which they were acting. Appellee was bound to protect its property if

it could do so with reasonable exertion and having failed to do so it is not entitled to recover herein.

CONCLUSION

Bearing in mind that this is not the case of one who is an insurer against damage, we submit that the evidence is wholly insufficient to render the appellant liable. The damage itself is not proof of negligence or breach of contract, but the burden is upon the appellee to prove, by a clear preponderance of the evidence, that the appellant was either guilty of negligence in one or more of the respects charged, which negligence was the proximate cause of the damage to the "Guard," or that the appellant breached its contract to furnish the vessel with ample fire protection while on the dry dock, and that such breach of contract was a proximate cause of the damage complained of.

In our opinion the relationship existing between the parties in this case at the time of the fire was not that of bailor and bailee, and we feel that the trial court erred in holding that this was a case of bailment, and in applying the rules of liability applicable to such a situation. We insist, moreover, that even if this were a bailment, the fact that the vessel was returned to the appellee in a damaged condition would not raise a presumption of negligence on the part of the appellant, but that the burden would still be upon the appellee to prove the allegations of its complaint by a fair pre-

ponderance of the evidence. This, of course, it made no effort to do, at least insofar as the question of negligence was concerned, being content to merely rely upon a prima facie showing.

Appellee does not allege any negligence prior to the discovery of the fire, and appellant's testimony clearly indicates that after the blaze was first noticed, everything possible was done to prevent its further spread. There is absolutely no showing that anything more could have been done that could reasonably be calculated to have held the fire in check.

Appellee charges that appellant did not furnish the vessel with ample fire protection, as required by the contract. The evidence shows, however, that the purpose of this provision was to give the vessel, when on the dry dock, protection equivalent to that which she had while in the water. When on the dock the "Guard" did not have the use of its own pump and fire hose, and to replace this a lengthy piece of hose connected to a 125-lb. water main, and capable of throwing a stream from 60 to 125 feet, was furnished to the vessel. This was regarded by the latter's commanding officer as being sufficient to protect the boat from fire, but no effort was made by the members of the crew to use this equipment when their vessel was threatened. Moreover, the evidence indicates that the vessel would have suffered the same fate no matter how many protective devices were supplied to the "Guard" by the appellant.

Appellee does not seriously question the sufficiency of the emergency fire-fighting equipment kept by the appellant for the protection of its own plant, and in fact it appears that this was modern and sufficient, and compared favorably with that of other similar yards in the locality. There is no suggestion that anything else should have been furnished, or that any other equipment might have been provided which could have been used in successfully combatting the fire after its discovery.

We contend that not only has appellee failed to prove its own case, but that it appears that the damage to the "Guard" was occasioned solely by the inattention and neglect of duty shown by the members of the vessel's own crew. It is evident that they could very easily have saved their boat from any damage whatsoever by merely cutting the lines that held the floating dock to the wharf, and allowing the wind to drift them across the waterway to a point of safety. This they neglected to do for a period of from fifteen to twenty minutes. Even when they realized that the "Guard" was in danger, approximately seven minutes after they had first gone on the wharf, they took considerable additional time to carry a small lifeboat out of the path of the same flames that were even then reaching toward their vessel.

We feel, therefore, that it is impossible to escape the conclusion that appellant was not guilty of any negligence or breach of contract in this matter, but that the proximate cause of the damage to appellee's boat was

a lack of diligence on the part of the members of its own crew. We accordingly contend that the judgment of the United States District Court for the Western District of Washington, Northern Division, should be reversed, and that the appellee's action should be dismissed.

Respectfully submitted,

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